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No. 96-17

# In the Supreme Court of the United States

OCTOBER TERM, 1996

NORTHROP GRUMMAN CORPORATION,
*Petitioner,*
v.
UNITED STATES EX REL. MICHAEL A. HYATT,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

In his Brief in Opposition, respondent Hyatt acknowledges that this Court has granted certiorari in *Hughes Aircraft Co. v. United States ex rel. Schumer,* No. 95-1340, in order to review, *inter alia,* the very same "question of retroactivity raised herein by Northrop." Opp. 1. Because, as respondent concedes, "the issue raised by petitioner Northrop is already before the Court," *id.,* the proper course is to defer consideration of the instant petition pending this Court's decision in *Schumer.* After the opinion in *Schumer* is issued later this Term, the petition in this case should be granted, the judgment of the Court of Appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *Schumer.*

**A. The Petition in This Case Should Be Held Pending This Court's Decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340 (cert. granted, Oct. 15, 1996)**

In its petition in this case, *see* Pet. 19-20, Northrop specifically noted that the question whether the 1986 amendments to the False Claims Act ("FCA") apply retroactively also was presented by the then-pending petition in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340. The petitioner in *Schumer* likewise observed that the retroactivity issue was presented in both cases, noting in its response to the Solicitor General's *amicus curiae* brief opposing a grant of certiorari in *Schumer* that "[t]he retroactivity issue is also presented in another pending petition, *Northrop Grumman Corp. v. United States ex rel. Hyatt*, No. 96-17 (filed July 2, 1996)." Supp. Br. for Hughes Aircraft Co. in *Schumer*, No. 95-1340, at 7 n.2.

On October 15, 1996, this Court granted review in *Schumer*, "limited to Questions 1 and 2 presented by the petition." 65 U.S.L.W. 3292. Question 1 in *Schumer* includes the issue of the retroactivity of the 1986 amendments to the FCA. *See Schumer* Pet. 9-11; *Schumer* Opp. 2-5; *Schumer* Rep. Br. 1-2; U.S. Br. in *Schumer* at 7-10; Supp. Br. in *Schumer* at 7. Indeed, respondent concedes that the question presented in this case raises the identical retroactivity issue upon which certiorari has been granted in *Schumer*. Opp. 1.

Where, as here, the petition raises a question that this Court has elected to decide on the merits in another case, the appropriate course of action is to hold the petition pending the decision in that other case.[1] *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (noting that "another

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[1] In his Opposition, respondent Hyatt repeats at length the Government's arguments, made unsuccessfully in its *amicus curiae* brief in *Schumer*, that the retroactivity issue is not worthy of plenary review in

petition for certiorari" raising the same issue was "being held pending disposition of this case"); *Winfield v. Kaplan*, 114 S. Ct. 2783, 2783 (1994) (Scalia, J., dissenting) ("When [the] petition [in *Winfield*] first came before us for consideration, we voted to defer disposition pending the announcement of our judgment in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), No. 93-880, because of the similarity of the issues presented in the two cases."); *see generally* R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* 243-44 (7th ed. 1993).

Accordingly, the petition in this case should be held pending the announcement of this Court's decision in *Schumer*. After that judgment is announced, this Court should grant the petition in the instant case, vacate the Ninth Circuit's judgment, and remand the case to that court for reconsideration in light of this Court's decision in *Schumer*. *See Lawrence v. Chater*, 116 S. Ct. 604, 606-07 (1996) (per curiam) (stating that "the GVR order" has "become an integral part of this Court's practice"); *Stutson v. United States*, 116 S. Ct. 611, 613 (1996) (Scalia J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided") (emphasis in original).

If this Court holds in *Schumer* that the 1986 amendments to 31 U.S.C. § 3730 do not apply retroactively to a case in which the government acquired its knowledge of the allegations before the effective date of the amendments (as Northrop has urged in its petition here), then the Ninth Circuit's judgment here cannot stand and a GVR certainly would be necessary in order to "alleviat[e] the '[p]otential for unequal treatment' that is inherent in [this Court's] inability to grant plenary review of all pending cases raising

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this Court. Opp. 1-5. These arguments are entirely moot in light of this Court's decision to grant certiorari on this issue in *Schumer*.

similar issues." *Lawrence*, 116 S. Ct. at 606-07 (quoting *United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982)).

Even if the Court holds that the amended FCA may be applied retroactively on the facts of *Schumer*, a GVR likely will be required in this case. The complaint here (unlike the one in *Schumer*) was filed *before* the effective date of the 1986 amendments, making this case an even stronger candidate for non-retroactivity than is *Schumer*. *See* Pet. 20 n.14. Thus, even if this Court were to hold that the amended § 3730 may be applied under the facts in *Schumer*, the Court nonetheless should GVR this case in order to allow the Ninth Circuit to consider whether this Court's discussion and analysis of the retroactivity question in *Schumer* requires that the amended statute not be applied to cases filed *before* its enactment.[2]

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[2] As noted in Northrop's petition, the amended *qui tam* provisions of the FCA are not severable from one another, and because the new under seal filing requirements cannot be applied retroactively to a suit filed *before* the enactment of the amended § 3730, no portion of that amended statute may be applied retroactively. Pet. 15-16. The Ninth Circuit reached a contrary conclusion only because of its erroneous view that *Landgraf requires* a subsection-by-subsection retroactivity analysis. Pet. App. 9a-10a. Tellingly, respondent Hyatt expressly disavows this *per se* approach, *see* Opp. 13 n.2, but he is unable to offer any persuasive alternative rationale for the Ninth Circuit's decision. Respondent suggests that a subsection-by-subsection analysis is appropriate *whenever* a statute contains some provisions that are "substantive" and some that are "procedural," *id.*, but this approach ignores that fact that the severability of a statute's provisions, for retroactivity purposes, is ultimately a question of congressional intent. *Landgraf*, 114 S. Ct. at 1505. Here, the available evidence demonstrates that Congress intended the amended § 3730 to apply, at a minimum, only to suits filed after the date of enactment of that statute. Pet. 15-16 & n.9.

**B. Respondent's Arguments Confirm the Ninth Circuit's Error in This Case**

Because the retroactivity issue will be "thoroughly briefed" for this Court in *Schumer* (as respondent notes, *see* Opp. 1), it is unnecessary to address at length respondent's arguments in defense of the merits of the Ninth Circuit's retroactivity analysis in *Schumer* and *Hyatt*. A brief examination of those arguments in any event confirms the Ninth Circuit's error in this case.

The Ninth Circuit held that the amended § 3730 would not have a retroactive effect because it would not alter the contractor's underlying liability to the government. Pet. App. 7a. In its petition, *see* Pet. 10-12, Northrop noted that this argument cannot be squared with *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), both of which clearly hold that a statute may be deemed to have a retroactive effect even if it does not "alter the normative scope" of the underlying legal obligation. *Id.* at 1515. *Landgraf* acknowledged that a statute will be deemed to have a retroactive effect *not only* if it "impose[s] new duties with respect to transactions already completed," *but also* if it would "impair rights a party possessed when he acted" or "increase a party's liability for past conduct." *Landgraf*, 114 S. Ct. at 1505.

Respondent argues that the Ninth Circuit's decision is consistent with *Landgraf* because the Court of Appeals recited each of the above-quoted phrases in its opinion. Opp. 9-10. But the Ninth Circuit's purported *application* of the *Landgraf* criteria suffered from precisely the same error that respondent commits in his Brief in Opposition: both acknowledge and quote the several phrases from *Landgraf*, but then proceed to collapse them into a single category. According to respondent, the amended § 3730 would have a retroactive effect *only* if it altered "the defendant's liability to the United States," Opp. 7, or "the right of the United

States to performance of contractual and other obligations free from fraud," *id.* at 11. *See also id.* at 8 (question is whether "truly substantive rights are involved"); *id.* at 12 (statute has retroactive effect only if it redefines "what conduct was actionable"). This analysis, which mirrors the Ninth Circuit's treatment of the issue, overlooks the fact that the amended § 3730, if applied retrospectively, would plainly eliminate Northrop's *substantive* right to obtain complete dismissal of this *qui tam* suit based on Northrop's earlier disclosures of information to the Government. *See* Pet. 8-12.

That the decision below cannot be reconciled with *Landgraf* also is illustrated by respondent's direct attack on the legal standard set forth by this Court in that case. In *Landgraf,* this Court stated that a statute has a retroactive effect if it "attaches new legal consequences to events completed before its enactment." 114 S. Ct. at 1499. Application of this standard here compels the conclusion that the Ninth Circuit erred: because Northrop's disclosures of information to the government occurred *before* the 1986 amendments, application of the new statute would nullify the immunity from *qui tam* suits that was triggered by those disclosures. Respondent makes absolutely no effort to dispute this point; instead, he simply attacks as "simplistic and mechanical" the underlying premise that a statute has a retroactive effect if it attaches new legal consequences to pre-enactment conduct. Opp. 8. But because that is the standard established in *Landgraf,* respondent's argument is nothing less than a frontal assault on *Landgraf* itself.[3]

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[3]Respondent simply ignores the fact that application of the amended § 3730 would significantly alter the government's rights *vis-a-vis* the relator. *See* Pet. 12 n.6.

## CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340 (cert. granted, Oct. 15, 1996). After this Court's opinion in *Schumer* is issued, the petition in this case should be granted, the judgment of the Ninth Circuit should be vacated, and the matter should be remanded to that court for reconsideration in light of this Court's decision in *Schumer*.

Dated: November 4, 1996

Respectfully submitted,

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